In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1478

DAVID PROSSER RANDELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. 1a–6a) is reported at 420 F. 2d 921.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1969 (Pet. 7a). Petitions for rehearing were denied on February 26, 1970 (Pet. 8a–9a). Mr. Justice Black granted an extension of time to file a petition for a writ of certiorari until April 27, 1970. Petitioner Randell filed his petition on April 25, 1970.[1]

[1] Co-defendants Auerbach and Gottlieb filed a petition to review their convictions (No. 1353, O.T., 1969) on March 26, 1970. The Government's opposition brief in No. 1353 has already been filed.

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The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment was rendered invalid by reason of the fact the court, prior to trial, ordered parts of the indictment stricken in accordance with a defense motion.

2. Whether petitioners were denied their Sixth Amendment right to a speedy trial.

STATEMENT

A 22-count indictment filed on March 14, 1963, in the United States District Court for the District of Arizona charged petitioner and co-defendants Auerbach and Gottlieb with mail fraud in violation of 18 U.S.C. 1341 (Pet. 10a–19a) in connection with offers to the public to sell certain real estate located in Mohave County, Arizona (R. 2572, 2585–2601). The indictment alleged that petitioner and defendants Auerbach and Gottlieb were officers, directors and stockholders of Lake Mead Rancheros, Inc.—a Delaware corporation licensed to transact business and having mailing addresses in Kingman, Arizona but with principal offices in Florida—and were actively engaged in the business of that corporation (Pet. 10a).

The substance of the scheme to defraud as alleged in the indictment is set forth on pp. 2–3 of the government's brief in opposition in No. 1353, the companion case. The general nature of the scheme was that, by reason of false and fraudulent representations, lots would be sold to the public advertised as fine invest-

ments located just a few miles from Kingman on a through route to Lake Mead, equipped with complete utility services for electricity, water and phones, and ready for immediate living. Paragraph 7 of count 1 of the indictment (Pet. 15a–16a) alleged as part of the scheme that, after approximately 3,000 persons had purchased lots in the original 17 subdivision units, the corporation entered into an agreement to purchase a strip of land, upon which there were existing power, telephone, and water lines, located about six miles from the nearest of the subdivision units.

Prior to trial, on the motion of defendants to dismiss certain paragraphs of count 1 of the indictment, the district court on December 11, 1967, after considering briefs and oral argument, ordered all of paragraphs 7 and 6(c), as well as the first two sentences of paragraph 8(a),[2] stricken (R. 2851). The district court doubted the relevancy of paragraph 7 to the overall scheme (R. 2909, 2913, 2935) and ruled that the allegations in 6(c) and 8(a) should be stricken as a "futuristic sort of puffing" (R. 2905, 2935).

The case was tried without a jury. Petitioner and the co-defendants were found guilty on all counts. On June 14, 1968, the court sentenced petitioner to prison terms of nine months on each of counts 1 through 22

[2] Paragraph 6(c) referred to representations "That Lake Mead Rancheros are a 'jackpot investment', 'among the finest investments anywhere', and 'directly located in the path of Arizona progress'." (Pet. 15a). The first two sentences of paragraph 8(a) referred to representations to "Build in a new community coming to life! A new community is about to come to life—and you can have a part of its future!" (Pet. 16a).

inclusive, suspended sentence, placed him on probation for three years, and ordered him to pay a $5,000 fine (R. 3046). On appeal, the convictions were affirmed (Pet. 1a–7a).

ARGUMENT

1. Petitioner contends the court's pretrial order, striking paragraphs 7, 6(c) and part of 8(a) of count 1, was an improper judicial amendment of the indictment without resubmission to the grand jury, thereby voiding the subsequent conviction (Pet. 12–16). His argument is premised upon the mistaken assertion that these paragraphs were stricken by the district court *sua sponte* (Pet. 5, 12), when in fact the district court's determination was in response to a pretrial motion filed by petitioner and co-defendants on November 24, 1967, seeking dismissal of the very parts of the indictment which were eliminated (R. 2851). Having come into the district court on pretrial motion and successfully argued for the elimination of the striken paragraphs, petitioner cannot now be permitted to set aside his conviction on the basis of the earlier ruling in his favor. See Rule 7(d), F.R. Crim. P.[3]

Moreover, in striking paragraphs 7, 6(c) and part of 8(a) of count 1, the district court did not change the indictment in any substantial manner. Since the fundamental nature of the overall scheme charged remained the same, the court's action clearly cannot be construed as an unauthorized amendment to the indictment. See *Salinger* v. *United States,* 272 U.S. 542,

[3] Rule 7(d): "The court on motion of the defendant may strike surplusage from the indictment or information."

548–549. As stated by the court below on denial of petitions for rehearing (Pet. 8a–9a), "the liberalizing effect Rule 7 (c) and (d) has had on the principles enunciated in *Ex parte Bain,*" 121 U.S. 1, prompted the conclusion "that the trial court did not commit reversible error" in this regard.

2. Petitioner's contentions relating to the alleged denial of the right to a speedy trial are answered in the government's brief in opposition in No. 1353, pp. 7–10.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

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